Lim Nyang Tak Michael v ACE Technologies Sdn Bhd

HIGH COURT (KUCHING) — SUIT NO KG53 OF 1994
ABDUL KADIR SULAIMAN J
2 DECEMBER 1994, 20 SEPTEMBER 1995

Civil Procedure *— Pleadings — Amendment of defence — Defence not pleaded — Application for amendment of statement of defence — Not made bona fide and a tactical manoeuvre to delay — Whether application to amend should be allowed — Rules of the High Court 1980 O 20 r 5*

Civil Procedure *— Summary judgment — Delay in application for summary judgment — Whether there was inordinate delay on the part of the plaintiff in applying for summary judgment — Rules of the High Court 1980 O 14*

The plaintiff claimed against the defendant for an agreed commission of $300,000 for introducing the defendant to be a sub-contractor for a construction project. The writ of the plaintiff was served on the defendant on 23 April 1994. The defendant filed its memorandum of appearance and its defence on 27 April 1994 and 4 May 1994 respectively. On 12 May 1994, the plaintiff filed an application under O 14 of the Rules of the High Court 1980 ('RHC') for summary judgment combined with one under O 18 r 19 of the RHC for the striking out of the defence. The plaintiff later elected to proceed only with the application for summary judgment. The hearing of the plaintiff's application was scheduled on 30 July 1994. However, the defendant filed an affidavit in opposition to the plaintiff's application and an application for leave to amend its statement of defence on 25 July 1994. The defendant would like to add into their defence that the documents relied on by the plaintiff were forged and that it was another agent and not the plaintiff who introduced the defendant to be a sub-contractor.

Held, dismissing the defendant's application to amend statement of defence and allowing the plaintiff's application for summary judgment with costs:

(1) If the defendant had a truly valid defence against the plaintiff's claim, it should not have waited until 25 July 1994 or, as stated in the proposed amended defence, until the discovery and/or inspection of documents to plead forgery and to bring in, in the proposed amendment, the issue of someone else other than the plaintiff who was the agent.

(2) It was not a question of negligence to plead all those matters in the original defence but a tactical manoeuvre and done in bad faith to delay the rights of the plaintiff on his claim. The application to amend the defence after exposure by the plaintiff in his affidavit in support was a tactic to confuse the issues by

creating imaginary 'triable issues' and to stall the plaintiff of his rights. If this was allowed, it would unnecessarily cause prejudice to the plaintiff which could not be compensated by costs.

(3) The plaintiff filed the summons for application for summary judgment on 12 May 1994 which was two weeks after the filing of the defence. Order 14 r 1 of the RHC gave the plaintiff the power to apply for summary judgment when his statement of claim had been served and the defendant had entered an appearance. The order did not prescribe the time limit beyond which such application might not be made. Two weeks' delay from the time of entry of appearance by the defendant was not an inordinate delay on the part of the plaintiff and not fatal to his application.

(4) The issue was whether the defendant by its defence and affidavit had satisfied the court that there was a triable issue on the plaintiff's claim. This burden rested with the defendant.

(5) The affidavit of the defendant's managing director filed in opposition to the plaintiff's application for summary judgment stated that documents exhibited by the plaintiff were forged. It also stated that one Jong Joo Sian and not the plaintiff was the agent who introduced the defendant to be a sub-contractor for the construction contract.

(6) There was no affidavit evidence from this Jong Joo Sian. There was also no evidence regarding his appointment and the amount of commission paid to him. As to the allegation of forgery, there was no evidence of a police report made.

(7) The affidavit evidence of the defendant's managing director was confusing and the defendant had failed to discharge its burden that there was a valid triable issue over the claim of the plaintiff.

[Bahasa Malaysia summary

Plaintif menuntut terhadap defendan komisyen yang dipersetujui sebanyak $300,000 kerana memperkenalkan defendan untuk menjadi kontraktor kecil bagi suatu projek pembinaan. Writ plaintif disampaikan kepada defendan pada 23 April 1994. Defendan memfailkan memorandum kehadiran dan pembelaan pada 27 April 1994 dan 4 Mei 1994 masing-masing. Pada 12 Mei 1994, plaintif memfailkan permohonan di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk penghakiman terus digabungkan dengan satu permohonan di bawah A 18 k 19 KMT untuk membatalkan pembelaan. Plaintif kemudiannya memilih untuk meneruskan hanya dengan permohonan untuk penghakiman terus. Pembicaraan permohonan plaintif ditetapkan pada 30 Julai 1994. Bagaimana pun, defendan memfailkan afidavit membantah permohonan plaintif dan permohonan untuk kebenaran untuk

meminda pernyataan pembelaan pada 25 Julai 1994. Defendan berhasrat untuk menambah dalam pembelaan mereka bahawa dokumen-dokumen yang digunakan oleh plaintif adalah palsu dan bahawa ada ejen yang lain dan bukan plaintif yang memperkenalkan defendan untuk menjadi kontraktor kecil.

Diputuskan, menolak permohonan defendan untuk meminda pernyataan pembelaan dan membenarkan permohonan plaintif untuk penghakiman terus dengan kos:

(1) Sekiranya defendan mempunyai pembelaan yang sebenarnya sah terhadap tuntutan plaintif, ia tidak sepatutnya menunggu sehingga 25 Julai 1994 atau, seperti yang dinyatakan dalam pembelaan pindaan yang dicadangkan, sehingga penzahiran dan/atau pemeriksaan dokumen untuk memplid pemalsuan dan untuk membawa masuk, di dalam pindaan yang dicadangkan itu, isu bahawa orang lain selain daripada plaintif yang merupakan ejen itu.

(2) Ianya bukanlah satu persoalan kecuaian untuk memplid semua perkara dalam pembelaan asal tetapi satu langkah taktikal dan dibuat dengan niat jahat untuk melambatkan hak-hak plaintif atas tuntutannya. Permohonan untuk meminda pembelaan selepas pendedahan oleh plaintif dalam afidavit menyokong adalah taktik untuk mengelirukan isu-isu dengan mencipta 'isu yang boleh dibicarakan' dan untuk melengahkan plaintif daripada menuntut hak-haknya. Jika ini dibenarkan ia akan mengakibatkan kemudaratan kepada plantif yang tidak boleh dipampaskan dengan kos.

(3) Plaintif memfailkan saman untuk permohonan untuk penghakiman terus pada 12 Mei 1994 iaitu dua minggu selepas pemfailan pembelaan. Aturan 14 k 1 KMT memberikan plaintif kuasa untuk memohon penghakiman terus apabila pernyataan tuntutan telah disampaikan dan defendan telah memasukkan kehadiran. Aturan itu tidak menetapkan had masa yang mana permohonan tidak boleh dibuat selepas tarikh itu. Kelewatan dua minggu daripada masa kemasukan kehadiran oleh defendan bukan kelewatan yang melampau bagi pihak plaintif dan tidak membawa padah kepada permohonannya.

(4) Isu yang berbangkit adalah sama ada defendan melalui pembelaannya dan afidavit telah meyakinkan mahkamah bahawa ada isu yang boleh dibicarakan di atas tuntutan plaintif. Beban ini terletak pada defendan.

(5) Afidavit oleh pengarah urusan defendan yang difailkan untuk membantah permohonan plaintif untuk penghakiman terus menyatakan bahawa dokumen yang diekshibitkan oleh plaintif adalah palsu. Ia juga menyatakan bahawa seorang Jong Joo Siang dan bukannya plaintif yang merupakan ejen yang memperkenalkan defendan untuk menjadi kontraktor kecil bagi kontrak pembinaan itu.

(6) Tidak ada keterangan afidavit daripada Jong Joo Siang. Juga tidak ada bukti berkenaan dengan perlantikannya dan jumlah komisyen yang dibayar kepadanya. Berkenaan dengan pengataan pemalsuan, tidak ada bukti bahawa laporan polis telah dibuat.

(7) Keterangan afidavit oleh pengarah urusan defendan adalah mengelirukan dan defendan telah gagal untuk melepaskan beban bahawa ada isu yang sah yang boleh dibicarakan ke atas tuntutan plaintif.]

Notes

For cases on pleadings, see 2 *Mallal's Digest* (4th Ed, 1994 Reissues) paras 2506–2772; [1994] *Mallal's Digest* 415–445 [1995] *Mallal's Digest* 280-313.

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197–3520; [1994] *Mallal's Digest* 484–506; [1993] *Mallal's Digest* 342–361.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400 (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183 (refd)
Teh Teik Sooi v Lim Kok Heong & Ors [1994] 2 CLJ 573 (distd)
Tong Lee Hua v Yong Kah Chin [1981] MLJ 1 (PC), [1979] 1 MLJ 233 (FC) (refd)

Legislation referred to

Rules of the High Court 1980 O 14 r 1, O 18 r 19, O 20 r 5

Chong Siew Chiang (*Chong Brothers Advocates*) for the plaintiff.
Chong Teck Chan (*Chan, Kho & Loy Advocates*) for the defendant.

Abdul Kadir Sulaiman J: By a specially indorsed writ of summons, the plaintiff claims against the defendant for alleged agreed commission of $300,000 ('the commission') for introducing the defendant to be a sub-contractor for Pembinaan Masrafan Sdn Bhd/Hidroelektra JV ('Masrafan') who is the contractor for the upgrading, improvement and bitumen surfacing of Bau Lundu-Sematan Road, Section A, B and C ('the Project'). The said writ of the plaintiff was served on the defendant on 23 April 1994 and on 27 April 1994 the defendant filed its memorandum of appearance followed by its defence on 4 May 1994. On 12 May 1994 the plaintiff filed an application under O 14 of the Rules of the High Court 1980 ('the RHC') for summary judgment combined with one under O 18 r 19 of the RHC for the striking out of the defence. However, at the hearing, the plaintiff elected to proceed only with his application for summary judgment.

The hearing of the application of the plaintiff was originally scheduled for hearing before the learned senior assistant registrar ('the SAR') on 30

July 1994. However, before the hearing date, on 25 July 1994 the defendant filed its affidavit in opposition to the plaintiff's application affirmed by its managing director, Chan Wa Keong, on 23 July 1994. Also on the same day, the defendant filed an application for leave to amend its statement of defence under O 20 r 5 of the RHC. This is done obviously upon the content of the affidavit in support of the plaintiff exhibiting certain exhibits therein which summons in chambers was served on the defendant on 16 May 1994, ie four days after it was filed in court. I say so because in the affidavit in support of the application and in its affidavit in opposition to the plaintiff's application, the authenticity of certain exhibits were seriously challenged by the defendant.

This application of the defendant was scheduled for hearing on 1 December 1994 before the learned SAR. On 30 July 1994 when the plaintiff's application under O 14 was before the court, it was adjourned to 6 August 1984 for arguments. On 6 August 1994 by consent the court allowed the said affidavit in opposition of the defendant though filed out of time to be used in the proceedings, but with liberty to the plaintiff to file affidavit in reply. Consequently the matter was further adjourned to 5 September 1994 for the court to decide which application to be disposed off first bearing in mind that by this time there were two applications filed in court, one for the plaintiff and the other for the defendant, though the defendant's application was scheduled earlier for hearing on 1 December 1994. On 5 September 1994, however, the learned SAR again deferred her decision to 23 September 1994 for directions from the judge. I agreed to take the matter out of the hands of the SAR and fixed the hearing of both the applications before me on 2 December 1994.

On the date of hearing, by consent, both the applications were to be heard together by me but the defendant be given the first opportunity to submit on its application for amendment of the defence and then for the plaintiff to reply including his submission on his application for summary judgment. The defendant would then be having its final reply in respect of both the applications. At the end of the day, after hearing submissions and considering the evidence in respect of both the applications, I dismissed the application of the defendant for amendment of the defence with costs to the plaintiff, and allowed the application of the plaintiff for summary judgment on the original defence of the defendant. I entered judgment in favour of the plaintiff in the sum of $300,000 being the agreed amount of commission payable by the defendant to the plaintiff with interest at 8% per annum from the date of judgment to date of settlement with costs to the plaintiff to be taxed, unless agreed. I now state my reasons.

First, I will deal with the reasons for the dismissal of the defendant's application for amendment of its defence under O 20 r 5 of the RHC. The reasons for the dismissal of the application of the defendant for the amendment of the statement of defence was on the ground that it was not made bona fide and was so made as a tactical manoeuvre to unnecessarily delay the disposal of the action of the plaintiff. The gist of the plaintiff's claim against the defendant is that by an agreement as

A evidenced by a letter dated 20 February 1992 from the defendant, the defendant agreed to pay the plaintiff a commission of $300,000 for the service of the plaintiff in arranging for the defendant to be a sub-contractor for Masrafan who is the contractor of the project. On 11 November 1992 the plaintiff pursuant to the agreement successfully introduced the defendant to Masrafan and a sub-contract for the project B was executed between Masrafan and the defendant. Consequently, by a letter dated 19 February 1993 the defendant offered to pay the said agreed commission to the plaintiff by instalments commencing from 28 February 1993. The defendant tendered by way of part payment of the commission a Standard Chartered Bank cheque dated 13 June 1993 C for $42,000 ('the Standard Chartered cheque') to the plaintiff. However, the cheque when presented for payment was dishonoured by the bank. Therefore, by a specially indorsed writ dated 20 April 1994 the plaintiff claims against the defendant for the amount of commission agreed, alternatively the sum of $300,000 on quantum meruit, or in further alternative the said sum for breach of the said agreement, interest and costs.

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On 27 April 1994 the defendant entered an appearance to the writ and on 4 May 1994 filed its defence. In the defence the defendant admitted that on or about 11 November 1992 it executed a sub-contract with Masrafan in respect of the project. However, it denies the appointment of the plaintiff as his agent as alleged and even if the E plaintiff was so appointed, it had not agreed to pay the plaintiff the said commission or at all. The defendant also denies the allegation that it had subsequently agreed to pay the commission to the plaintiff by monthly instalments. It, however, admits that the plaintiff was given the Standard Chartered cheque, but it subsequently instructed the bank to stop payment on the cheque and followed by it giving the F plaintiff another cheque drawn on Public Bank Bhd dated 18 June 1994 for the same amount ('the Public Bank cheque') and this second cheque was honoured by the bank. It avers that this amount of $42,000 was towards repayment of a monetary advance previously made to the defendant by the plaintiff with interest thereon and not as part payment G of the commission. It is to be noted that in the defence of the defendant, it was silent on the two letters mentioned by the plaintiff in his statement of claim, ie one dated 20 February 1992 as the basis for the agreement and the other dated 19 February 1993 as evidence of promise to pay the said commission by monthly instalment, apart from the general denial.

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Then on 12 May 1994 there was filed an application by the plaintiff for a summary judgment under O 14 RHC. As earlier mentioned, originally this application of the plaintiff included also the prayers under O 18 r 19 of the RHC. However, during the hearing, the plaintiff elected to proceed only with its application under O 14. In support of his application there is exhibited to his affidavit in support, inter alia, four documents, exhibits I 'LNTI', 'LNT2', 'LNT3' and 'LNT4'. Exhibit 'LNT1' is a letter dated 29 February 1992 using the letterhead of the defendant addressed to the plaintiff, bearing the purported signature of Chan Wa Keong, as the managing director of the defendant and witnessed by one Lee Heng

Cheong, an advocate of Lot 169 (2nd Floor) Jalan Chan Chin Ann, Kuching, Sarawak. This letter according to the plaintiff is the basis of the agreement for the commission payable to him. This letter was mentioned in para 1 of his statement of claim in the action. Exhibit 'LNT2' is the agreement dated 11 November 1992 entered into between the defendant and Masrafan for the project. This agreement is purportedly signed by Chan Wa Keong for the defendant as sub-contractor. Exhibit 'LNT3' is a letter dated 19 February 1993 using the letterhead of the defendant addressed to the plaintiff, purportedly signed by Chan Wa Keong, as the managing director of the defendant. This letter according to the plaintiff is the basis for the promise of the defendant to pay the commission to him by monthly instalments as averred in para 4 of his statement of claim. Exhibit 'LNT4' is the Standard Chartered cheque dated 13 June 1993 for $42,000 which was dishonoured as averred in para 5 of his statement of claim alleged to be payment of part payment of the said commission due to him. The summons in chambers of the plaintiff together with the affidavit in support and the exhibits were served on the defendant on 16 May 1994.

In the meanwhile, on 14 May 1994 the plaintiff filed its reply to the defence of the defendant in the action. The plaintiff admits that he had received the Public Bank cheque being payment for the loan as alleged by the defendant. However, he maintains that the Standard Chartered cheque was for the part payment of the commission. In other words what the plaintiff is saying is that the defendant gave him two cheques each for the same amount and each for a different purpose. The Standard Chartered cheque was for part payment of the commission and the Public Bank cheque was for the payment of the said loan with interest.

The defendant did nothing until 25 July 1994, ie about 2½ months after the service of the plaintiff's summons in chamber for summary judgment and the filing of the reply to the defendant's defence, when the defendant filed the affidavit in opposition to the plaintiff's application and an application under O 20 r 5 of the RHC for leave to amend its defence. The proposed amendment is on three aspects. First is the averment that the letter dated 20 February 1992 (exh 'LNT1' to the affidavit in support of the plaintiff's application under O 14) is a forgery, though the signature thereon is similar to that of Chan Wa Keong, its managing director. It is also averred that the said Chan Wa Keong did not execute the letter before Lee Heng Cheong, the advocate and that the full particulars of the forgery and inauthenticity of the letter shall be furnished after discovery and/or inspection of documents in the action. The second aspect concerns a new averment that one Jong Joo Sian, and not the plaintiff, was solely responsible for introducing the defendant to Masrafan in respect of the project and a commission of $50,000 was paid by the defendant to this Jong Joo Sian. The last aspect concerns the letter dated 19 February 1993 (exh 'LNT3' to the affidavit in support of the plaintiff's application under O 14). The defendant avers that the letter is also a forgery and not an authentic document, though the signature thereon is similar to that of Chan Wa Keong and the full particulars of the forgery and authenticity of the letter shall be furnished after discovery and/or inspection of documents.

Now, if the defendant had a truly valid defence against the claim of the plaintiff it should not have waited until 25 July 1994 or as stated in the proposed amended defence until the discovery and/or inspection of documents to plead forgery and to bring in, in the proposed amendment the issue of someone else other than the plaintiff who was the agent. There was in the statement of claim of the plaintiff an averment concerning his agreement with the defendant based on a letter dated 20 February 1992 and by a letter dated 19 February 1993 the defendant offered to pay the said commission by monthly instalments. In the light of such averments by the plaintiff, it would be prudent upon the defendant before it decided to file its defence to verify on these facts instead of filing a general defence denying liability. In the face of the assertion of the plaintiff in the statement of claim that he was the agent, the defendant merely makes a general denial without particularizing who the real agent was if it was not the plaintiff. It is only in the proposed amendment that a new person comes to light. It is my finding that all the issue of forgery and the new agent comes about on account of it being confronted with the evidence of the agreement in exh 'LNT1' and the evidence of proposal to pay the commission by monthly instalments in exh 'LNT3'. It is not a question of negligence to plead all those matters in the original defence but a tactical manoeuvre and done in bad faith to delay the rights of the plaintiff on his claim. The affidavit in support of the application by the defendant for amendment is affirmed by Mathew Chan Theng Kiang, the counsel for the defendant. It is not affirmed by anyone else who is able of his own knowledge to prove. It does not contain statements of information or belief with sources and grounds thereof on the material issue apart from saying that the 'Defendant saw both the letter dated the 20th day of February, 1992, and the letter dated the 19th of February, 1993, for the first time as Exh "LNT 1" and Exh "LNT3", respectively, in the Plaintiff's Affidavit in Support affirmed on the 12th day of May 1994'. Be that as it may, the validity of this assertion is very hard to swallow in the light of the defendant's inaction in the face of the averment in the statement of claim of the plaintiff. No reason is given for the proposed averment that Jong Joo Sian was the real agent in respect of the contract with Masrafan in the project. The deponent also deposed that there has been no delay in making this application for amendment as no date has yet been fixed for the hearing of the action. In my view, the question of delay is one thing and the question of the motive behind its filing in the light of the circumstances, is another. The application of the plaintiff was originally scheduled to be heard on 30 July 1994. The summons was served on the defendant on 16 May 1994. But it was only on 25 July 1994, ie five days before the scheduled hearing of the application of the plaintiff, that this application of the defendant was filed together with the affidavit in opposition of the plaintiff's application, thereby directly or indirectly contributing to the delay in the disposal of the plaintiff's application. The application to amend the defence after the exposure by the plaintiff in his affidavit in support is nothing but a tactic to confuse the issue by creating an imaginary 'triable issue' and to

stall, if not to deprive, the plaintiff of his right. If this is allowed it would unnecessarily cause prejudice to the plaintiff which cannot be compensated by costs.

The learned counsel for the defendant cited the case of *Teh Teik Sooi v Lim Kok Heang & Ors* [1994] 2 CLJ 573. Reading through the case cited, I am of the view that it can be easily distinguished from the present matter before me. In that case the plaintiff commenced an action against the defendants for a declaration that he is a partner in a partnership business known as Hotel Kuala Lumpur, in which the defendants were partners by virtue of half share through the first defendant and that the second to the fifth defendants having known of the fact, acquiesced and/or consented to the plaintiff holding the half share through the first defendant. He also prayed for an account of what was due to him from the defendants in respect of money received by the defendants from their partnership and for an order for payment by the defendants to the plaintiff of any sum found due upon such account. When faced with the application of the defendants to have the statement of claim struck out under O 18 r 19 of the RHC and before the application was heard, the plaintiff filed an application to amend the said statement of claim by raising the existence of a trust and a novation of the partnership agreement. Edgar Joseph Jr SCJ allowed the amendment sought by the plaintiff. At p 576 his Lordship says this:

> Looking at paras 5 to 9 of the proposed amended statement of claim, it may be, that if at the trial the plaintiff is able to establish the same, it might enable him to overcome the problem he faces with regard to the statement of claim in the form it now takes, to which I have briefly adverted. This is because, on the version of the facts now advanced by the plaintiff in his proposed amended statement of claim, he is averring what might give rise to a trust in respect of what he alleges is his share of the partnership business in his favour, *the trust being created by the alleged oral agreement between the first defendant on the one part and the other defendants of the other part.* To put it another way, the terms of paras 5 to 9 of the amended statement of claim, if true, might be *sufficient to raise the existence of a novation of the partnership agreement, whereby the plaintiff was introduced as a sleeping partner with the concurrence of all the other partners.* [Emphasis is mine.]

Having dismissed the application of the defendant for amendment of its defence, what is left is the application of the plaintiff for summary judgment under O 14 of the RHC. The specially indorsed writ of the plaintiff was served on the defendant on 23 April 1994 and on 27 April 1994 the defendant filed its memorandum of appearance followed by its defence on 4 May 1994. The plaintiff filed this application soon after that on 12 May 1994. Hence, at the time of filing his application, there was already filed the defence of the defendant. For that reason, the original application of the plaintiff was in relation to O 14 and O 18 r 19 of the RHC. However, as mentioned earlier, the plaintiff at the commencement of the hearing elected to proceed only with his O 14 application and abandoned his intention on O 18 r 19 RHC. In my view, this slight delay by the plaintiff in filing this application after defence filed is not fatal as it was reasonable in the circumstances. The

appearance was entered on 27 April 1994 and the defence was filed on 4 May 1994, within a matter of one week. The summons in chambers of the plaintiff was filed on 12 May 1994, two weeks after the entry of appearance by the defendant. Order 14 r (1) of the RHC gives the power to the plaintiff to apply to the court for summary judgment against the defendant in an action to which the rule applies, when his statement of claim has been served on the defendant and that defendant has entered an appearance in the action. This is the starting point for making the application. The Order does not prescribe the limit beyond which such application may not be made. However, in instances where the application is made after the defence is filed the plaintiff must explain the delay in doing so. If on the circumstances, the delay is not inordinate, the court in the exercise of its discretion may not refuse the application merely on the ground that it was made after the defence has been filed. What is inordinate delay would depend on the circumstances of each case. In the circumstance of this case, I would not hold that the two weeks delay from the time of the entry of appearance by the defendant is an inordinate delay on the part of the plaintiff. Hence this two weeks delay on the part of the plaintiff is not fatal to his application.

In his affidavit in support the plaintiff deposes that he verily believes that there is no defence to his claim and/or action. The learned counsel for the defence submitted that since before the filing of the application the defendant had filed its defence, the defendant has rebutted the assertion of the plaintiff that it has no defence to the action. I do not think the learned counsel is right. The burden placed upon the defendant when confronted with such an application of the plaintiff is to satisfy the court by affidavit evidence not only that the defence has raised an issue but that the issue is arguable. See *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 and *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 — both Supreme Court decisions. Whether an issue is or is not triable depends on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. In determining whether the defendant has raised a triable issue, the decision in *Bank Negara Malaysia*'s case, supra, at p 408 is that:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable.

Further down the same page the judgment continues that:

> If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v Casey* and *European Asian Bank AG v Punjab & Sind Bank* at p 516.)

It is to be borne in mind that the purpose behind O 14 application for summary judgment is to prevent the plaintiff clearly entitled to the claim from being delayed his judgment when there is no fairly arguable defence to the claim. In the light of the existence of the defence by the defendant at the time of this application of the plaintiff for summary judgment, the issue is whether the defendant by its defence and its affidavit in opposition has satisfied the court that there is a triable issue on the plaintiff's claim. According to *Tong Lee Hua v Yong Kah Chin* [1981] 1 MLJ 1 PC and [1979] 1 MLJ 233 FC, this burden rests with the defendant. In the statement of claim, the plaintiff relied on two letters from the defendant. The letter dated 20 February 1992 establishing contractual relationship between the parties upon the plaintiff bringing together the defendant and Masrafan into the project by way of a sub-contract. The other is a letter dated 19 February 1993, also from the defendant offering to pay the agreed commission on a monthly basis. The defendant by its defence denied such agreement and offer made but admitted that there was a sub-contract executed between it and Masrafan. By his affidavit in support the plaintiff exhibited those two letters as 'LNT1' and 'LNT3' respectively to prove his point. By its affidavit in opposition the defendant alleged that 'LNT1' and 'LNT3' were seen for the first time when exhibited in the affidavit in support of the plaintiff. He further deposes that at the trial of the action and in the present proceedings the defendant would categorically deny and challenge the authenticity of the two exhibits. As regards 'LNT1' and 'LNT2' (the sub-contract agreement between the defendant and Masrafan dated 11 November 1992) the deponent denied executing them though the signatures appearing therein look similar to his. Thus, based on his affidavit evidence 'LNT2' is also a forgery. In its defence, while admitting of the existence of the sub-contract, there was absolutely no mention made of any agent who worked towards getting the defendant and Masrafan to enter into the sub-contract whilst making a general denial of the plaintiff's agency. However, in the affidavit in opposition, one Jong Joo Sian was named as the agent and exhibiting a confirmation letter from this Jong Joo Sian, exh 'SCWK1', dated 28 May 1994 acting upon the request made by the defendant's managing director for such confirmation. There is, however, no affidavit affirmed by this Jong Joo Sian filed by the defendant in support of the contention that he was the agent of the defendant in respect of the sub-contract. If the allegation of the defendant that it was Jong Joo Sian and not the plaintiff who was appointed as agent for it to procure the said sub-contract with Masrafan, then why was this fact not pleaded in the original pleading as this fact was well within the defendant's knowledge at the time and in the face of the averment in the statement of claim of the plaintiff. If the appointment of this Jong Joo Sian is true, it is strange that for an amount of commission to be paid to this man which is $50,000 according to 'SCWK1', that there has been no written appointment made or exhibited. There is also no evidence forthcoming from the defendant to show that that amount of commission had been paid to this Jong Joo Sian apart from the confirmation as requested for by the managing

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director of the defendant that the $50,000 was to be paid by instalments. On the assertion by the defendant that it was Jong Joo Sian who was the agent in the transaction and not the plaintiff, 'SCWK1' mentions that there was nobody else involved in the negotiation for the sub-contract meaning that the plaintiff was not at all involved in the matter. However, para 5 of the affidavit of the managing director for the defendant affirmed by Chan Wa Keong on 3 October 1994 deposes that the only role of the plaintiff was that of an interpreter for the representative/agent of the defendant, meaning Jong Joo Sian, in the negotiation with Masrafan, thereby disclosing that the plaintiff also was involved in the negotiation at least as an interpreter. Further, according to 'SCWK1' Jong Joo Sian said he was present in the subsequent negotiation of the sub-contract between Masrafan and the defendant. But in para 4 of Chan Wa Keong's said affidavit when encountering an allegation as contained in the affidavit for the plaintiff of Idris Buang, the legal advisor to Masrafan, that Jong Joo Sian was never present in any negotiation but instead in every instance, without fail, it was the plaintiff with whom he spoke and it was the plaintiff who was negotiating solely on behalf of the defendant, Chan deposes that there was no need for the said Jong Joo Sian to be present at the meetings after he had introduced the project to the defendant. This piece of evidence by the managing director is all confusing and with nothing but to confuse the issue which is prima facie not triable at all. The strong evidence for the plaintiff is the content of the affidavit of the said Idris Buang, the legal advisor to Masrafan, an independent party to this dispute. There is no reply to this affidavit of Idris Buang. I believe the truth of the content of that affidavit which throws the light that it was the plaintiff and not Jong Joo Sian who negotiated for the defendant with Masrafan in the formation of the sub-contract between the defendant and Masrafan. This affidavit of Idris Buang has put a nail in the coffin against the defendant. In the circumstances, I would hold that 'LNT1' and 'LNT3' are valid documents emanating from the defendant to the plaintiff and 'LNT2' is the agreement executed by Chan Wa Keong, the managing director on behalf of the defendant. 'LNT1' was witnessed by Lee Heng Cheong, an advocate. Paragraph 4 of the plaintiff's affidavit in support drew the attention of the defendant to this fact. By the affidavit in opposition, the defendant merely denied the signature of its Managing Director therein though it looks similar to his. There is no attempt made to file an affidavit of this Lee Heng Cheong denying his involvement in the matter or the defendant providing an explanation for the absence of this evidence by Lee Heng Cheong. There is yet another exhibit 'LNT4' included by the plaintiff in his affidavit in support. There is no dispute as to this exhibit and as to the signature of the defendant's managing director, Chan Wa Keong. Looking at the signatures appearing in all the four exhibits, I cannot but come to the conclusion that all the signatures therein purporting to be that of the managing director are truly his signature. There could yet be another basis for suggesting that 'LNT1' and 'LNT2' or for that matter, 'LNT3' are forgeries if the defendant could provide evidence of a police report made. But again,

there is no evidence as to that. In the circumstance, I am of the view that the defendant had failed to discharge its burden that there exists a valid triable issue over the claim of the plaintiff. As there is no triable issue on the defence of the defendant, I enter judgment for the plaintiff on his application with costs.

Order accordingly.

Reported by Timon Shum